No. 21979

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REUBEN G. LENSKE,

Appellant,

v.

F.M. SERCOMBE, et al.,

Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court
for the District of Oregon

THE HONORABLE JOHN F. KILKENNY, Judge.

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STATEMENT CONCERNING JURISDICTION

The complaint (C.T.[1] 1) cites the following authorities for invoking jurisdiction of the district court.

Constitution of the United States,
Amend. V, Amend. XIV

42 USCA §§ 1981-1988

28 USCA §1343

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1 The Clerk's Record is referred to herein as "C.T."
The Reporter's Transcript is referred to herein as "R.T."

State ex rel Oregon State
Bar v. Lenske, 243 Or 477,
405 P2d 510, 407 P2d 250
(1965) cert den 384 US 943,
86 S Ct 1460, 16 Led2d 541
reh den 384 US 1028, 86 S Ct
1920, 16 Led2d 1047

The district court held that it did not have "jurisdiction" to conduct an appellate review of the decision of the Oregon Supreme Court (C.T. 62, 70, 71).

Lenske v. Sercombe, 266 F Supp
609 (D Or, 1967)

Appellees[2] agree that the district court did not have such jurisdiction, both for the reasons set forth in Judge Kilkenny's opinion and for the reasons set forth in this brief.

This court has jurisdiction to hear this appeal pursuant to 28 USCA § 1291.

STATEMENT OF THE CASE

A. Summary of Facts

The underlying facts are contained in two opinions of the Supreme Court of the State of Oregon, which are, by reference, expressly made a part of the complaint (C.T. 1).

State ex rel Oregon State Bar
v. Lenske (Sep 9, 1965) 243 Or
477, 405 P2d 510

State ex rel Oregon State Bar
v. Lenske (Nov 3, 1965) 243 Or
477, 484, 407 P2d 250, cert den
384 US 943, 86 S Ct 1460, 16

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2 Appellees respectfully suggest the death on July 16, 1967, of Philip A. Levin, one of the appellees herein.

Led2d 541, reh den 384 US 1028, 86 S Ct 1920, 16 Led2d 1047

In summary, these facts are as follows:

While appellant was a member of the Oregon State Bar, he was convicted in the United States District Court in Oregon of income tax evasion. The Oregon State Bar filed with the Oregon Supreme Court a certified copy of the judgment of conviction. On the basis of that conviction and pursuant to Rule I of the Supreme Court Rules for the Admission of Attorneys[3] then in effect, the Oregon Supreme Court summarily suspended appellant from the practice of law. Appellant was notified of the order of suspension (Lenske deposition, pp 9-10). Thereafter, at the instance of the Oregon State Bar, an original contempt proceeding in the Oregon Supreme Court was instituted against appellant in which it was charged that he had violated the court's order of suspension by continuing to practice law and by holding himself out to the public and members of the Bar as eligible to practice law. An order to show

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3 "Rule I. Suspension after conviction of crime

"Whenever it appears to the Supreme Court that any member of the bar has been convicted of a misdemeanor involving moral turpitude or of a felony, the Court may summarily suspend such member. * * * The suspension shall continue until the member is reinstated by the Court." [Reprinted at 235 Or, Rules for Admission of Attorneys in Oregon p 20.]

cause was issued, appellant appeared, and the Oregon Supreme Court appointed a referee for the purpose of holding a hearing, taking testimony for that court, and making findings.

After the hearing before the referee and entry of findings by the referee, the Supreme Court of Oregon found that appellant had committed acts constituting the practice of law while having knowledge of the entry of the order of his suspension from the practice of law. The court concluded that appellant was guilty of criminal contempt of that court because of his violation of that court's order of suspension. The court sentenced appellant to pay a fine of $500 or to serve out such time in jail.

Appellant filed a petition for writ of certiorari with the United States Supreme Court,

Exhibit No. 2 to Lenske deposition
(identified at p 34)

which was denied,

384 US 943, 86 S Ct 1460,
16 Led2d 541 (1966)

and a "Petition for Rehearing and Reconsideration of Petition for writ of Certiorari,"

Exhibit No. 3 to Lenske deposition
(identified at p 34)

which was also denied

384 US 1028, 86 S Ct 1920,
16 Led2d 1047 (1966.

B. <u>This Litigation</u>

Appellant then filed this action in the United

States District Court in Oregon, naming as defendants the individual members of the Supreme Court of Oregon, the individual members of the Board of Governors of the Oregon State Bar, the Clerk of the Supreme Court of Oregon, the secretary of the Oregon State Bar and the attorney who acted for the Oregon State Bar in the prosecution of the criminal contempt proceedings against appellant (C.T. 1-2).

The complaint contains a variety of alleged violations of appellant's federal constitutional rights during the state court proceedings (C.T. 2-4). The complaint prays both that the suspension and contempt orders of the Supreme Court of Oregon be declared void and that the defendants be restrained and enjoined from doing any act toward enforcing the same (C.T. 4).

The three defendants who had been served (the Clerk of the Supreme Court, the secretary of the Bar and the attorney for the Bar), filed an answer (C.T. 5). They subsequently moved for summary judgment on the following grounds (C.T. 20-21):

1. No effective decree could be framed against them;
2. An act of Congress--28 USCA §2283--precluded the relief plaintiff was seeking;
3. Under established principles of federal-state judicial comity, res judicata and

jurisdiction, the district court should decline to entertain the action; and

4. Plaintiff was validly convicted of contempt.

At the initial hearing on the motion for summary judgment, counsel for the answering defendants requested that the court first consider the jurisdictional and procedural matters raised in points 1, 2 and 3 of the motion and reserve for later determination, if necessary, the questions raised by point 4, which would involve a consideration of appellant's constitutional charges (R.T. 38-39, 42-43, 59-60). The court acceded to this request (R.T. 39, 60-61).

After the hearing, appellant served the other defendants who in turn filed answers (C.T. 41, 48) and also moved for summary judgment (C.T. 45, 52). The defendants named as members of the Oregon State Bar based their motion upon the same grounds urged in the motion previously filed (C.T. 52-53). The members of the Oregon Supreme Court based their motion on the same grounds except that they did not urge that no effective decree could be entered against them (C.T. 45-46).

The district court granted the motions for summary judgment on the grounds that, as to all defendants other than the members of the Oregon Supreme Court, no effective decree could be framed and that, as to the individual members of the Oregon Supreme Court, the district

court should not attempt what, in essence, would be an appellate review of the state court proceedings (C.T. 62, 70, 71).

Lenske v. Sercombe, 266 F Supp 609 (D Or, 1967)

Appellant then appealed to this court (C.T. 67).

This court has since reversed appellant's income tax conviction,

Lenske v. United States, ___ F2d ___ (9 Cir, Aug 28, 1967)

and the Supreme Court of Oregon has since lifted the suspension order,[4] thus allowing appellant to again practice law.

In re Lenske, 85 Or Adv Sh No. 6 (Oct 24, 1967)

C. Question Not Presented

At the outset, it should be noted that appellant's

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4 Rule 8.05 of the Rules for Admission of Attorneys in Oregon, presently in effect and the successor to Rule I, supra, provides,

"Suspension after conviction of crime.

"If it appears to the Supreme Court that a member of the Oregon State Bar has been convicted of a misdemeanor involving moral turpitude or of a felony, the Supreme Court may suspend such member summarily. A judgment on a plea of nolo contendere is considered a conviction within the meaning of this rule. Rules of procedure relative to discipline do not apply to a suspension under this rule. The suspension continues until the individual is reinstated by the Supreme Court. If it is made to appear to the Supreme Court that the conviction is reversed on appeal, the suspension imposed under this rule shall be lifted." [Reprinted at 243 Or, Rules for Admission of Attorneys in Oregon pp 28-29] (Emphasis added).

3. Even if 28 USCA § 2283 is not a bar to issuance of the injunction, should the district court, under accepted principles of jurisdiction, comity and res judicata, decline to review appellant's charges?

SUMMARY OF ARGUMENT

The action should be dismissed as to all defendants other than the members of the Supreme Court of Oregon because no effective decree can be entered against them. In addition, and as to all defendants including members of the Supreme Court of Oregon, 28 USCA § 2283 prohibits the injunctive relief prayed for in the complaint. Even if 28 USCA § 2283 is not a bar to issuance of the injunction, the federal district court properly declined, under accepted principles of jurisdiction, comity and res judicata, to review appellant's charges.

ARGUMENT

I

NO EFFECTIVE DECREE CAN BE ENTERED AGAINST THE DEFENDANTS OTHER THAN THE INDIVIDUAL MEMBERS OF THE SUPREME COURT OF OREGON.

The object of the complaint is to obtain an injunction enjoining all the defendants from taking any action to enforce the suspension and contempt orders of the Supreme Court of Oregon. Such an injunction entered

against all defendants other than the members of the Supreme Court of Oregon would be a meaningless, futile and useless act. As pointed out by the district court, 266 F Supp at 611-612, the Supreme Court of Oregon has exclusive jurisdiction under its common law and statutory powers to suspend, disbar or reprimand members of the Oregon State Bar.

Jenkins v. Oregon State Bar,
241 Or 283, 405 P2d 525 (1965)

ORS 9.480[5]

ORS 9.540(4)[5]

At most, the Oregon State Bar has only the limited power to recommend to the Supreme Court of Oregon the suspension, disbarment or reprimand of a lawyer.

ORS 9.540(1)[5]

Jenkins v. Oregon State Bar,
supra

The defendants, other than the individual members of the Supreme Court of Oregon, have no standing or authority to enforce or refrain from enforcing the suspension and contempt orders.

Clark v. State of Washington 366 F2d 678 (9 Cir, 1966)

This case involved a factual situation remarkably analogous to the instant case. Clark was disbarred from the practice of law by the Supreme Court of Washington.

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5 Reprinted in Appendix

The Supreme Court of the United States denied certiorari and rehearing. Clark then brought this action against the State of Washington and the Washington State Bar Association under a Civil Rights Act, 42 USCA § 1983, alleging that the disciplinary proceedings were conducted in such manner as to violate his rights under the federal constitution. He sought a decree to vacate the judgment of disbarment, an injunction to restrain the defendants from revoking his license to practice law, an order to require the defendants to restore him to the list of active members of the Bar Association and damages. In affirming the dismissal of the action by the district court, this court stated with respect to the Bar Association:

> "The Bar Association had power to and did recommend to the Washington Supreme Court that it disbar Clark, R.C.W. 2.48.060, but it had no power to and did not disbar him. That power, together with the power to 'admit and enroll attorneys in the state of Washington,' is exclusively in the Washington Supreme Court. In re Bruen, 102 Wash. 472, 476, 172 Pac. 1152, 1153; In re Simmons, 59 Wn. 689, 369 P.2d 947, 956.
>
> "It follows that no effective decree can be framed against the Bar Association to afford Clark the relief he seeks in this action. The Supreme Court has stated that dismissal of an action is warranted when an indispensable party (the Supreme Court of Washington in this case) is not made a party to the action. See Williams, et al v. Fanning, Postmaster of Los Angeles, 332 U.S. 490, 493; Daggs v. Klein, 9 Cir., 169 F.2d 174, 176.
>
> "We therefore hold that the district court did not err in dismissing the action against the Bar Association." (p 682)

Hackin v. Lockwood, 361 F2d 499 (9 Cir, 1966), cert den 385 US 960, 87 S Ct 396, 17 Led2d 305

Hackin brought an action in the federal district court of Arizona against the individual justices of the Supreme Court of Arizona and The State Bar of Arizona, claiming that the defendants had violated his federal constitutional rights in regard to certain rules of admission to practice which denied him the right to take the Arizona Bar examination. With respect to The State Bar of Arizona, this court said:

> "The State Bar of Arizona is not an appropriate party to the suit because it cannot promulgate or change the rules governing admission to practice in Arizona. Its Board of Governors can suggest rules to the Arizona Supreme Court, and can enforce them, but only with the approval of the Arizona Supreme Court. Arizona Revised Statutes §32-237, subsec. 2 (1956)." (p 500)

It is axiomatic that a court will not entertain a cause where any decree entered will be ineffectual. No effective decree can be framed against any of the defendants, other than the members of the Supreme Court of Oregon. The judgment of dismissal as to the defendants other than the members of the Supreme Court of Oregon should thus be affirmed.

II

28 USCA § 2283 PRECLUDES THE ISSUANCE OF THE INJUNCTION PRAYED FOR IN THIS ACTION.

The authority of federal courts to enjoin proceedings in state courts has been severely limited by

Congress.

28 USCA § 2283

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Appellant would apparently rely upon

42 USCA § 1983

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The question, then, is whether the "suit in equity" authorized by § 1983 is an exception to § 2283 as a proceeding "expressly authorized by Act of Congress." On that question there is strong case authority holding that a suit under § 1983 is not an "expressly authorized" exception to § 2283 and, thus, that 28 USCA § 2283 prohibits the issuance of an injunction.

Goss v. State of Illinois
312 F2d 257, 259 (7 Cir, 1963)

Smith v. Village of Lansing
241 F2d 856, 859 (7 Cir, 1957)

Baines v. City of Danville 337 F2d 579 (4 Cir, en banc, 1964) cert den 381 US 939, 85 S Ct 1772, 14 Led2d 702, reh on other grounds (removal) 357 F2d 756, petition for writ of certiorari on that other ground (removal) only filed, 34 LW 3308

affirmed per curiam on that other ground (removal) 384 US 890, 86 S Ct 1915, 16 Led2d 996, reh den 385 US 890, ___ S Ct ____, 17 Led2d 121

Chaffee v. Johnson 229 F Supp 445, 447 (SD Miss, 1964) affirmed 352 F2d 514, cert den 384 US 956, 86 S Ct 1582, 16 Led2d 553

Cameron v. Johnson 262 F Supp 873 (SD Miss 3-judge court, 1966) probable juris noted ___ US ___, ___ S Ct ____, ___ Led2d ___, 36 LW 3126 (Oct 9, 1967)

The case most similar to the Lenske case is

Goss v. State of Illinois 312 F2d 257 (7 Cir, 1963)

Here, the plaintiff, who had been named as corespondent in a divorce suit, discussed the divorce suit on his local television show. His discussions resulted in his being held in criminal contempt by the state divorce court. The Supreme Court of Illinois ultimately affirmed the contempt conviction, and the Supreme Court of the United States denied certiorari and rehearing. Plaintiff then filed an action in the federal district court against the state, the county sheriff and the county district attorney asking for a declaratory judgment that his civil rights (freedom of speech and freedom of the press) would be violated if the mittimus for his arrest was not held void and its enforcement permanently enjoined.

The district court granted the injunction, but the Seventh Circuit reversed, saying, with respect to § 2283:

"Several decisions have pointed out that this section has not been modified nor is an exception engrafted thereon by the terms of the Civil Rights Act (42 U.S.C. § 1981 et seq.) or the Declaratory Judgment Act (28 U.S.C. § 2201 et seq.). H.J. Heinz Co. v. Owens, 9 Cir., 189 F.2d 505; Great Lakes Dredge & Dock Co. v. Huffman, 319 US 293, 63 S.Ct. 1070, 87 L.Ed. 1407; Smith v. Village of Lansing, 7 Cir., 241 F.2d 856; Sexton v. Barry 6 Cir., 233 F.2d 220.

"Although we have heretofore held herein that the District Court had no jurisdiction of this cause, in any event, 28 U.S.C. § 2283 would bar the assumption of jurisdiction. No act of Congress has authorized an exception to § 2283 which would cover this case. There is no judgment of a federal court to be protected. The clause "in aid of jurisdiction" has no application under the facts of this case." (p 259)

There is a decision of the Third Circuit holding that a suit brought under 42 USCA § 1983 is an exception to 28 USCA § 2283

Cooper v. Hutchinson, 184 F2d 119, 124 (3 Cir, 1950)

However, there is no discussion whatever of the question and the opinion accordingly provides no rationale for the holding.

On October 9, 1967, the United States Supreme Court noted probable jurisdiction in a case in which one of the questions to be argued is whether a suit under 42 USCA § 1983 is excepted from the prohibition of 28 USCA § 2283.

Cameron v. Johnson (No. 699)
___ US ___, ___ S Ct ___,
___ Led2d ___, 36 LW 3126

III

WHETHER OR NOT 28 USCA § 2283 IS A BAR, THE LOWER FEDERAL COURTS SHOULD DECLINE, UPON PRINCIPLES OF JURISDICTION, COMITY AND RES JUDICATA, TO INTERFERE WITH THE PROCEEDINGS OF THE OREGON SUPREME COURT IN THIS CASE.

Whether or not 28 USCA § 2283 is a bar, the fact is that federal courts consistently have refused and are refusing to hear such cases as the case at bar. The refusals are based upon principles of jurisdiction, comity or res judicata, or a combination of those principles.

a. Jurisdiction

Appellant is in effect asking a federal court to exercise appellate jurisdiction over the Supreme Court of Oregon. The Supreme Court of Oregon suspended appellant from the practice of law. Subsequently, he practiced law and was adjudged in contempt of court. Certiorari and rehearing were denied by the United States Supreme Court. The contempt conviction is a final judgment. Several federal courts faced with similar circumstances have dismissed the actions on the ground that the final state court judgments were not subject to review by the federal district court. These decisions point out that the federal district court generally has only original jurisdiction and that the only federal court which can exercise appellate

jurisdiction over state court judgments is the United States Supreme Court. Examples include:

Rooker v. Fidelity Trust Co. 263 US 413, 44 S Ct 149, 68 Led 362 (1923)

Ash v. Northern Illinois Gas Company 362 F2d 148, 151 (7 Cir, 1966)

Schroeder v. State of Illinois 354 F2d 561, 563 (7 Cir, 1965) cert den 384 US 972, 86 S Ct 1862, 16 Led2d 682

Goss v.State of Illinois 312 F2d 257, 259 (7 Cir, 1963)

Drawdy Investment Company v. Leonard 261 F2d 226 (5 Cir, 1958)

Williams v. Tooke 108 F2d 758 (5 Cir, 1940) cert den 311 US 655, 61 S Ct 8, 85 Led 419

As pointed out by the district court in the case at bar, 266 F Supp at 612, the rule is well established in the analogous area of disbarments that the lower federal courts do not have "jurisdiction" to review state court decisions.

Gately v. Sutton, 310 F2d 107 (10 Cir, 1962)

> "The petitioner, Gately, formerly a practicing attorney in Colorado Springs, Colorado, relying upon one of the provisions of the Civil Rights Act, 42 U.S.C. § 1983, brought this action against members of the Supreme Court of Colorado requesting, in his prayer for relief, an order directing that Court to set aside an order of disbarment and damages in the sum of $500,000. This is an appeal from an order dismissing the petition upon the ground that the federal district court was without jurisdiction to award the relief prayed for.
>
> * * *

"The Supreme Court of Colorado has exclusive jurisdiction to admit attorneys to practice in the Colorado courts and to strike them from the roll for misconduct. Colo.Rev.Stat.1953, §§ 12-1-1, 12-1-8. The federal courts do not have jurisdiction to review an order of the Colorado Court disbarring an attorney in that state for personal and professional misconduct. Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585. See in re MacNeil, 1 Cir., 266 F.2d 167, cert. denied 361 U.S. 861, 80 S.Ct. 120, 4 L.Ed.2d 103; In re Noell, 8 Cir., 93 F.2d 5; In re Bennethum, D.Del., 196 F.Supp. 541; In re Crow, N.D. Ohio, 181 F.Supp. 718, aff'd 6 Cir., 283 F.2d 685; Keeley v. Evans, D.Or., 271 F. 520, appeal dismissed 257 U.S. 667, 42 S.Ct. 184, 66 L.Ed. 426. In Theard v. United States, 354 U.S. 278, 281, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342, the Supreme Court said:

> "'It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in Konigsberg v. California, 353 U.S. 252, [77 S.Ct. 722, 1 L.Ed.2d 810], and Schware v. Board of Bar Examiners, 353 U.S. 232 [77 S.Ct. 752, 1 L.Ed. 2d 796], to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment. While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. * * *'

"The limits of review referred to are violations, in the course of disbarment proceedings, of the due process or equal protection clauses of the Fourteenth Amendment, and a petition for a writ of certiorari to the Supreme Court of the United States is the only method by which review may be had. In re MacNeil, supra." (p 108, emphasis added).

Accord:

Howard v. United States District Court for Dist of Colo, 318 F2d 521, 523 (10 Cir, 1963)

Jones v. Hulse 267 F Supp 37 (ED Mo, 1967)

The plaintiff, an attorney, contended that his federal constitutional rights were violated in a suspension proceeding. He filed an action to enjoin the chairman and members of a state bar committee and the Clerk of the Missouri Supreme Court from initiating, taking or participating in any action to enforce a mandate of the Missouri Supreme Court suspending plaintiff's license to practice law. The defendants moved to dismiss and, in the alternative, for summary judgment. The court dismissed the action on the ground it lacked jurisdiction over the subject matter, stating:

> "It is well settled that Federal courts do not have jurisdiction to review an order of a state court disbarring an attorney in that state for personal and professional misconduct. In the Matter of the Disbarment of Rhodes, 370 F.2d 411 (CA8); Clark v. State of Washington, 366 F.2d 678 (CA9); Gately v. Sutton, 310 F.2d 107 (CA10); Howard v. United States District Court for the District of Colorado, 318 F.2d 521 (CA10); and Keeley v. Evans, 271 F. 520 (CA9), App. dismissed 257 U.S. 667.
>
> * * *
>
> "The plaintiff contends that this court should take jurisdiction over the present controversy by either viewing the action as an original civil action under the Civil Rights Act, 42 U.S.C.A. § 1983 and 28 U.S.C.A.§ 1343, or by viewing it as an original equitable action under 28 U.S.C.A. § 1331.

"The plaintiff's contention is without merit. Regardless of the label that the plaintiff is attempting to put upon the present action, it is obviously nothing more than an attempt to have this court review the mandate of the Supreme Court of the State of Missouri suspending the plaintiff's right to practice law in Missouri. Furthermore, were this court to take jurisdiction over the present case as an original civil suit, it would not only have to review the action taken by the Supreme Court of Missouri, but it would also have to review the action of the Supreme Court of the United States in dismissing the plaintiff's petition for a writ of certiorari.

"The fact that the present action is brought under the Civil Rights Act does not give this court jurisdiction over the subject matter as an original civil action. Gately v. Sutton, supra; Clark v. State of Washington, supra. The only method for the plaintiff to seek review of the decision by the Missouri Supreme Court suspending his license is to petition the Supreme Court of the United States for a writ of certiorari. Gately v. Sutton, supra. This the plaintiff has already done, and without success." (p 39)

Whether one uses the phrase "jurisdiction" or, as suggested by thiscourt in Clark v. State of Washington 366 F2d 678, 681 (9 Cir, 1966), the term "failure to state a claim," the result is that appellant is not entitled to the relief he seeks in the federal district court.

b. Comity

Comity involves a respect by the federal courts for the function which state courts serve in our governmental system. Even when a federal court has jurisdiction and can grant the relief requested, it will often refuse, because of comity, to interfere with a state court.

The United States Supreme Court has instructed the lower federal courts to be extremely reluctant to interfere in state court proceedings, especially criminal proceedings.

> Douglas v. City of Jeannette 319 US 157, 63 S Ct 877, 87 Led 1324 (1943)
>
> Stefanelli v. Minard 342 US 117, 72 US 118, 96 Led 138 (1951)

The rule of comity has been applied in situations very similar to that involved here.

Rhodes v. Houston 202 F Supp 624 (D Neb, 1962), affirmed per curiam 309 F2d 959, cert den 372 US 909, 83 S Ct 724, 9 Led2d 719

Plaintiff was an attorney. He was convicted of contempt of the state court, fined $2,500, and sentenced to nine months at hard labor. He then brought this action in the federal court against, among others, the Nebraska Supreme Court justices and the state trial judge, asking for damages and an injunction against his being imprisoned, arguing that his federal constitutional rights had been violated.

The court held that the injunction would be denied because of the delicate relationship between federal and state courts. The court pointed out that only rarely will a federal court interefere with the conduct of state officials, especially by injunction. The court refused, out of consideration of comity, to issue an injunction here.

Goss v. State of Illinois 312 F2d 257 (7 Cir, 1963)

This is the case discussed supra, pages 14-15, in which plaintiff had been convicted of contempt in a state trial court, the Supreme Court of Illinois had ultimately affirmed, and the United States Supreme Court had denied certiorari and rehearing. In holding that the plaintiff was not entitled to challenge this conviction in a federal court by declaratory and injunctive proceedings, even though he was claiming a denial of federal constitutional rights, the Seventh Circuit relied not only upon 28 USCA § 2283, but also on comity, saying:

> "By commencing this suit in the federal court after the Illinois Supreme Court had affirmed the criminal contempt conviction, and the Supreme Court of the United States had denied certiorari, plaintiff seeks to thwart the final state court judgment by relitigating, in a trial de novo, the very issues that had been litigated in the state court. If this newly discovered appellate procedure is permitted, many state criminal prosecutions will be faced with chaos and unenforceability.
>
> * * *
>
> "We live in a jurisdiction of two sovereignties. Each has its own system of courts which operates in a common territory. Great care should be taken to avoid embarrassing conflicts. An accused should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the state unless the necessary operation of such machinery prevents his having a fair trial. Wilson v. Schnettler, 365 U.S. 381, 81 S.Ct. 632, 5 L.ed.2d 620.
>
> "State judges, as well as federal, have the responsibility to respect and protect persons from violation of federal constitutional rights. The Supreme Court of the United States has the

right to pass on any such cases decided by the highest court of a state. Also, there is the remedy of federal habeas corpus which is predicated upon the accused submitting himself to custody after having exhausted state remedies.

"Federal courts have been and should be reluctant to interfere by injunction in a state court criminal proceeding. As stated by Mr. Justice Douglas in his dissent in Pugach v. Dollinger, 365 U.S. 458, at page 462, 81 S.Ct. 650, at page 652, 5 L.Ed.2d 678: 'The strongest expression of that reluctance is found in the general prohibition of federal injunctions "to stay proceedings in a State Court." 28 U.S.C. § 2283.'" (p 259)

Schroeder v. State of Illinois 354 F2d 561, 563,(7 Cir, 1965) cert den 384 US 972, 16 Led2d 682

Plaintiffs lost a condemnation case in the state court. They brought a civil rights action in the federal district court for injunctive relief and for a declaratory judgment that the state decisions were void. The Seventh Circuit affirmed the trial court's dismissal of the plaintiffs' suit stating:

"The relief sought is a declaration that the Illinois court decisions, in proceedings at trial and on review, are void even though the courts had jurisdiction of the subject matter and parties. These allegations, even if true, do not present either a gound for a federal question jurisdiction under 28 U.S.C. § 1331, since the state court admittedly had jurisdiction over the parties and the subject matter, Chance v. County Board of School Trustees, 332 F.2d 971, 974 (7th Cir. 1964); or a ground upon which to obtain review of the state court proceedings by a federal district court under 28 U.S.C.A. § 1343 through invocation of 42 U.S.C. § 1983, Goss v. State of Illinois, 312 F.2d 257, 259 (7th Cir. 1963). Schroeders' attempt 'to thwart' the final state court judgments by relitigating in a trial de novo the very issues which were, or should have been, raised in the state courts concerning state law, and upon which

[illegible] to read [illegible] court [illegible] nature of a degree. [illegible] upon the [illegible] health [illegible].

"Federal [illegible] courts [illegible] [illegible]."

[illegible]

Probably the most [illegible] said in the past

court. There ought [illegible] a small [illegible] in the general

district court [illegible]

judges that the proper [illegible]

Circuit [illegible]

court stating:

"The [illegible]"

certiorari to the United States Supreme Court might have been sought. To paraphrase what was said in Goss about permitting such 'appellate procedure,' if it were done many state court judgments would be faced with chaos and unenforceability. 312 F.2d at 259."

Stevens v. Frick, 259 F Supp 654 (SD NY, 1966), affirmed 372 F2d 378, cert den US , S Ct , 18 Led2d 973 (May 22, 1967)

The plaintiff author brought an action to enjoin defendant from further prosecuting a civil case against him in a Pennsylvania state court. Plaintiff claimed his federal constitutional rights would otherwise be violated. The district court dismissed the case, stating that whether or not 42 USCA § 1983 was an exception to 28 USCA § 2283,

"Even in those circuits which characterize section 1983 as an express authorization by Congress to enjoin state court proceedings, however, the assertion is tempered by the application of 'familiar rules of comity' and an awareness of the 'delicate balance' of federal-state relationships. See Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964) and cases therein cited. Thus, even assuming the requisite degree of state action and, further, that section 1983 can properly be viewed as Congressional authority to stay improper state action, I am constrained to conclude that interference by this court with the Pennsylvania action would constitute an unwarranted distortion of sensible rules of comity." (p 657)

c. Res Judicata

The familiar principles of res judicata and collateral estoppel bar this action. Appellant is clearly attempting to relitigate in the federal court those issues which have already been raised and decided against him in

the state court in a judgment which is now final.

Hicks v. City of Los Angeles 240 F2d 495 (9 Cir, 1957)

A city civil servant was discharged from his job. He challenged his discharge both in administrative and state judicial proceedings. The state judgment against him became final. He then attempted to relitigate the whole matter in the federal courts on the ground that the state administrative and judicial officials had denied him due process under the federal Constitution. This court held against him on the ground that the action was barred by res judicata.

Accord:

Grubb v. Public Utilities Commission
281 US 470, 74 Led 972 (1930)

Wilke & Holzheiser, Inc. v. Reimel
266 F Supp 168 (ND Cal, 3-judge
court, 1967)

There is no reason for a federal court to interfere with the state court proceedings at this, the final stage of those proceedings. Appellant has had his day in court. He had his opportunity to present all his federal constitutional claims to the Supreme Court of Oregon and then to the United States Supreme Court which denied certiorari and rehearing. Appellant has lost that case. The federal courts should not now interfere with the right of the Supreme Court of Oregon to enforce its decision, a decision which has become final. Appellant should not be allowed to relitigate the same issues in the federal

district court.

CONCLUSION

For the reasons set forth hereinabove, the judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

"ORS 9.480 Grounds for disbarment, suspension or reprimand.

"The Supreme Court may disbar, suspend or reprimand a member of the bar whenever, upon proper proceedings for that purpose, it appears to the court that:

"(1) He has committed an act or carried on a course of conduct of such nature that, if he were applying for admission to the bar, his application should be denied; or

"(2) He has been convicted in any jurisdiction of an offense which is a misdemeanor involving moral turpitude or a felony under the laws of this state, or is punishable by death or imprisonment under the laws of the United States, in any of which cases the record of his conviction shall be conclusive evidence, or

"(3) He has wilfully disobeyed an order of a court requiring him to do or forbear an act connected with his profession; or

"(4) He is guilty of wilful deceit or misconduct in his profession; or

"(5) He is guilty of wilful violation of any of the provisions of ORS 9.460 or 9.510."

"ORS 9.540 Disciplinary proceedings conducted by board of governors; review by Supreme Court; costs.

"(1) The board of governors may, by a two-thirds vote of the board, after a hearing for any of the causes set forth in the statutes warranting disbarment or suspension, or for any breach of the rules of professional conduct, make an order recommending to the Supreme Court the disbarment of any member, or that such member be disciplined by reproval, public or private, or by suspension from practice. The board shall keep a transcript of evidence and proceedings in all matters involving disbarment or suspension and may make findings of fact. In any case, the board shall render a written decision on the proceedings. Notice, and a copy of the decision and any recommendation of the board,

certified by the secretary of the Oregon State Bar, immediately shall be transmitted by registered or certified mail to said member at his last-known postoffice address; and the board immediately shall file a copy of the decision and any recommendation, certified by the secretary of the Oregon State Bar with the transcript and findings, whenever findings are made, with the Clerk of the Supreme Court. Any person against whom the board shall make any such recommendation may, within 60 days after the filing of the certified copy of the decision and recommendation, petition the Supreme Court to review the decision and recommendation or to modify, reverse or reject the same. Upon review of any decision or recommendation of the board, the Supreme Court, after due notice and such hearing as the court may determine, may affirm, adopt, modify, reverse or reject the same, and thereupon shall make an appropriate order. When 60 days have elapsed after the filing of the certified copy, if no petition for review has been filed, the Supreme Court may affirm, adopt, modify, reverse or reject the decision or any recommendation of the board and make all necessary orders in conformity therewith.

* * *

"(4) The disciplinary grounds and procedures set forth in this chapter are not intended to limit or alter the inherent powers of the courts to disbar or discipline members of the bar."

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

CURTIS W. CUTSFORTH
Of Attorneys for Appellees